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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 897

JAMES M. CASIDA, ET AL.,

Petitioners,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, AND LOCAL 351, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. ----------

JAMES M. CASIDA, ET AL.,
Petitioners,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, AND LOCAL 351, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

James M. Casida and twenty-seven other working men,[1] who lost their jobs and pensions by reason of

[1]The other twenty-seven petitioners are David I. Crane, Wayne C. Tolbert, Edgar R. Thompson, John D. White, Billy J. Willhite, Allen L. Stanford, Mack N. Funk, Calvin L. Montgomery, Calvin G. Kimberlin, Hubert Howard, T. A. Carriker, Rex J. Beck, C. W. Lipps, C. V. Tyler, Ernest E. Hubbard, Walter L. Laymon, Earl R. Christy, Eugene Meier, Dale Edward Little, C. E. Plumlee, Orville L. Flaming, W. F. Keeter, J. W. Newberry, John Rowland, Jr., George Ivan Reed, Harry G. Williams and Artie Lee Brown.

the union conduct hereinafter discussed, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas[2] entered in this cause on February 3, 1964.

Opinions Below

The opinion rendered by the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas on February 3, 1964, holding "that the subject matter of this cause 'arguably' comes within the jurisdiction of the National Labor Relations Board," hereinafter referred to as "NLRB" or as the "Board," and that, as a consequence, "the State court is without jurisdiction to hear and determine the merits of this case and must defer jurisdiction to the Board" (376 S.W. 2d 818) is reported at 376 S.W.2d 814. It is printed as Appendix A, pp. 1a-10a, of the Appendices.

The *first* opinion of the Supreme Court of Texas, through which that court refused "to grant this application for writ of error solely on the ground that the conduct in question is arguably subject to the jurisdiction of the National Labor Relations Board," has not been reported. It is dated July 29, 1964, and

[2] It is believed that the writ should run to the intermediate appellate court because if the state courts have jurisdiction, that court must determine on the merits the questions of state law presented by the appeal. It is only after this has been done that application for writ of error may be filed in the Supreme Court of Texas. However, if we are in error in this, we respectfully request, in the alternative, that the writ issue to the Supreme Court of Texas.

is printed as Appendix B, pp. 11b-12b, of the Appendices. On November 11, 1964, the Supreme Court denied motion for rehearing of the application for writ of error and substituted for its original opinion an opinion reported in 383 S.W.2d 571. It is printed as Appendix C, pp. 13c-14c, of the Appendices. This action made the state court judgment final.

The only difference between the first and final opinions of the Supreme Court of Texas is that in its original opinion that court cited only one case in support of its decision, *Plumbers' Union v. Borden*, 373 U.S. 690, whereas in its final opinion it cited that case and some other opinions by this Court.

Jurisdiction

The judgment and opinion of the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas were entered on February 3, 1964, and the rehearing duly and timely filed by petitioners (appellees there) was overruled without written opinion on March 30, 1964. (Appendix A, pp. 1a-10a, of the Appendices.)

Application for writ of error was timely filed in the Supreme Court of Texas and was refused by that court through a written but unpublished opinion handed down on July 29, 1964; and on November 11, 1964, that court denied the motion for rehearing timely filed by petitioners and substituted another and published opinion for its first opinion, such action making final the state court judgment.

(Appendices B and C, pp. 11b-14c, of the Appendices.)

The jurisdiction of this Court is invoked under 28 *U.S.C.* 1257 (3), in that the courts of Texas have erroneously held that the damage award against respondent unions resulted from a controversy that is subject to the exclusive jurisdiction of the NLRB.

Question Presented

Do the state courts have jurisdiction to award compensatory damages to twenty-eight members of a labor union who lost their jobs because, after a strike had begun, they trespassed upon their employer's property to shut down its gasoline plants, all in violation of the employer's instructions that the plants be left running; and who shut the plants down in reliance upon false representations by authorized agents of respondent unions that petitioners were required by law to do so and that if they did so and were discharged as a result thereof, they would get their jobs back or jobs equivalent thereto? Is such conduct by respondent labor unions "arguably subject to the jurisdiction of the" NLRB, thereby depriving the state courts of jurisdiction to award petitioners damages against respondent unions?

Does the preemption rule apply despite the fact that the employer's action in discharging petitioner employees *was made the basis for complaints filed with the Board*, which complaints were not prosecuted by the Board because there was "insufficient evidence of violation" of the Act? Did not the Board

through its action *necessarily* determine that the activity involved is *not* "subject to the protection of § 7 or the prohibitions of § 8 of the National Labor Relations Act," thereby completely satisfying the requirements of the primary jurisdiction rule?

Statutes Involved

The federal statutory provisions involved are Section 7, and Subsections 8 (a) (1), (a) (5), (b) (1) (A) and (b) (2) of the Labor Management Relations Act, 1947, 61 *Stat.* 136, *et seq;* 29 *U.S.C.* §§ 157, 158 (a) (1), (a) (5), (b) (1) (A), (b) (2). The state statutory provisions involved are Article 5153, *Vernon's Texas Stats.*, and Article 439 of the *Texas Penal Code.* These provisions are reproduced in Appendix D, pp. 15d-17d, of the Appendices.

Statement of the Case

A. The Decision Below.

The Texas state courts have held that they have no jurisdiction to award petitioners compensatory damages against respondent unions for the jobs and pensions petitioners lost as a result of their trespassing upon their employer's property to shut down its gasoline plants after a strike had begun, despite their employer's instructions that the plants be left running, petitioners having shut down the plants by reason of orders to do so from respondent unions' agents and in reliance upon false representations of such agents that the law required that petitioners shut the plants down and that, while petitioners

might lose their jobs as a result thereof, they would get the jobs back or jobs just as remunerative.

B. The Case Established by the Jury Verdict.

The case was submitted on special issues to a jury and the jury's verdict, which constitutes the *sole* basis for the judgment against respondent unions given petitioners by the trial court, in its pertinent aspects is as follows:

(1) That duly authorized agents of respondent unions represented to petitioners that when a strike is called the law requires that the plants where petitioners are working be shut down by petitioners; that such representations were material, were false, and were relied upon by petitioners in shutting down the plants. (Special Issues Nos. 1(a), 1(b), 1(c), 1(f), 1(g), 1(h), 3(a), 3(b), 3(c), 4(a), 4(d), 4(e), 4(f), 6, 11, 12, 13(a), 14(a), 15(a), 16(a); VII Tr.[3] 11, 14, 19-20, 23, 27, 32-5.)

(2) That duly authorized agents of respondent unions represented to petitioners that if they lost their jobs by reason of shutting the plants down, they would get their jobs back or jobs of equal pay value; that such representations were material, were false, and were relied upon by petitioners in shutting down the plants. (Special Issues Nos. 2(a), 2(b), 2(c), 2(f), 2(g), 2(h), 3(a), 3(b), 3(c), 5(a), 5(d), 5(e), 5(f), 6, 11, 12, 13(a), 14(a), 15(a), 16(a); VII Tr. 15-16, 18-20, 24, 26-7, 32-5.)

[3] "Tr." refers to the compilation of pleadings, orders, *etc.*, in the trial court, such compilation being referred to in Texas as the "Transcript."

(3) That duly authorized agents of respondent unions ordered petitioners to shut down the plants and that but for such orders petitioners would not have shut down the plants. (Special Issues Nos. 7 (a), 7(b), 11, 13(a), 16-A(c), 16-B(c); VII Tr. 27-8, 32-3, 36-7.)

(4) That petitioners were discharged by their employer because they shut the plants down. (Special Issue No. 10; VII Tr. 30-2.)

Based upon the above jury findings and other findings not pertinent to the jurisdictional issue, the trial court awarded petitioners damages against respondent unions in the total sum of $1,186,568.40. (VIII Tr. 115-16.)

C. The Proceedings Before the NLRB.

After petitioners had been discharged, lawyers employed by respondent unions filed with the NLRB on behalf of the unions "An 8(a) (1) charge" and an 8(a) (5) charge against the employer and on behalf of the discharged employees, including petitioners, filed 8(a) (1) and 8 (a) (3) charges against the employer. The contention was that the employer had violated the Act by discharging petitioners and by refusing to bargain collectively concerning their reinstatement.[4]

[4]These and other exhibits reflecting action by the Board were not admitted in evidence before the jury but are contained in the record that under Texas practice is referred to as the "Statement of Facts," the abbreviation of which is "S.F." (11 S.F. 61, 62, 63, 65, 67, 71, 72, 73; see also 8 S.F. 69-84.)

On October 29, 1958, the Regional Director of the Board informed respondent unions that the alleged "violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered" and that "because there is insufficient evidence of violation, further proceedings are not warranted at this time." An appeal was taken to the office of the General Counsel and on March 13, 1959, he notified the unions that "The General Counsel sustains the ruling of the Regional Director." Like the Director, the General Counsel concluded that "there is insufficient evidence of violations to warrant further proceedings." (See Appendices E and F, pp. 18e-20f of the Appendices.)

How Federal Question is Presented

Respondent unions challenged the state court's jurisdiction by appropriate plea thereto. This plea was overruled by the trial court and judgment given petitioners upon the basis of the jury's verdict. (II Tr. 83; VIII Tr. 113-117.)

The Texas Court of Civil Appeals reversed the ruling of the trial court and held "that the State court is without jurisdiction." (376 S.W. 2d 818; Appendix A, pp. 1a-10a, of the Appendices.)

Petitioners filed their application for writ of error in the Supreme Court of Texas and the first six points of error presented therein raised the issue of jurisdiction. (Application for writ of error, pp. 5-6.) The Supreme Court of Texas refused the application for writ of error "solely on the ground that

the conduct in question is arguably subject to the jurisdiction of the National Labor Relations Board." (383 S.W. 2d 571; Appendices B and C, pp. 11b-14c, of the Appendices.)

Reasons Relied on for the Allowance of the Writ

A. Importance of the Question.

This is one of those cases presenting "another important question concerning the extent to which the National Labor Relations Act . . . has excluded the exercise of state power."[5] It presents an entirely *new* "facet of the recurrent problem of defining the permissible scope of state jurisdiction in the field of labor relations."[6] For the *first* time this Court is asked to determine the scope of state jurisdiction *after* the requirements of the primary jurisdiction rule have been met, that is, *after* the NLRB has exercised its jurisdiction and determined that the activity involved is *not* "subject to the protection of § 7 or the prohibition of § 8 of the National Labor Relations Act."[7] This is the case this Court envisioned when it said: "If a ruling on (D) [a ruling by the Board that the activity complained of did not violate Section 8 (b) (4) (D) of the Taft-Hartley Act] necessarily encompassed a ruling on the other subsections, we would have a different case."[8] (See pp. 17-19, *post.*)

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[5] *Machinists v. Gonzales*, 356 U.S. 617, 618.

[6] *Plumbers' Union v. Borden*, 373 U. S. 690, 691.

[7] *Id.*, at 693.

[8] *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 478.

While the state court decisions below hold that the preemption rule applies, this Court has stated that the fact "that the Act 'leaves much to the states' —*is no less important*" than the fact that it has taken important jurisdiction away from the states.[9] We believe the Court is as much concerned with correcting grievous error resulting in unduly limiting state jurisdiction as it is in correcting an erroneous enlargement of state jurisdiction.

The foregoing consideration is particularly important here because the opinion of this Court principally relied upon by the courts below[10] is one in which this Court reversed the Supreme Court of Texas. Quite obviously it is the view of that court, smarting under reversal in *Borden* and in other labor cases,[11] that the Taft-Hartley Act leaves little, if any, jurisdiction to the states, and that the safer path is for a state court to hold that the preemption rule applies. This is the opposite extreme to the course taken by other state courts. For example, the Supreme Court of Idaho has frankly announced that it will assert state court jurisdiction in all doubtful cases in order that its citizens may not be exposed to the danger of being left without remedy.[12]

Even more important, this case is one demonstrating how the difficult issue of preemption may be

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[9]*Machinists v. Gonzales*, 356 U.S. 617, 619; all emphasis is ours unless otherwise indicated.

[10]*Plumbers' Union v. Borden*, 373 U.S. 690, was the *only* case cited by the Supreme Court of Texas in its first opinion.

[11]*E. G., Ex Parte George*, 371 U.S. 72.

[12]*Lockridge v. Amalgamated Association of St. Elec. Ry., etc., Employees*, 84 Ida. 201, 208, 369 Pac. 2d 1006, 1010.

resolved and the parties left to their state court remedies in a situation in which it is proper to do so. Here respondent unions, upon being advised of the terrible consequences of their activity, did as they should have done and filed proceedings with the NLRB in an attempt to force the employer to reinstate petitioners to their jobs. In those proceedings the Board made determinations necessarily leading to the conclusion that the activity involved was outside the scope of the preemption rule. This Court's approval of such procedure and its consequences will go far to reduce the field of hardship that results from the "arguably subject to" test of the preemption rule.

Finally, while this Court is not primarily concerned with the hardship of a particular case, the plight of the twenty-eight petitioners who lost their jobs and pensions through the reprehensible conduct of respondent unions merits some consideration. Certainly petitioners should not be denied compensation for their loss considering the fact that the NLRB has held that there was "insufficient evidence" the activity involved was within the purview of the Taft-Hartley Act.

B. The Texas Decision is not in Accord With Applicable Decisions of This Court.

For two reasons the decision of the Texas courts is not in accord with applicable decisions of this Court. First, the primary jurisdiction rule, which is

the very heart of the preemption doctrine,[13] has been satisfied; and, second, the litigation focuses on "internal union matters, *i.e.*, on relations between the individual plaintiff and the union not having to do directly with matters of employment . . .,"[14] thereby making the preemption rule inapplicable. We consider the first question first.

(1) *The primary jurisdiction rule has been satisfied and hence the preemption doctrine is inapplicable.*

The issue may be squarely joined by quoting a portion of respondents' argument below[15] concerning the necessity for applying the primary jurisdiction rule, the basis for the preemption doctrine:

> ". . . Rather, that case establishes that the federal tribunal must wrestle with the factual findings and applicable policy considerations to determine whether on the particular facts the 'coercion' is the type proscribed by the federal statutes . . .
>
> "Similarly, in the case at bar whether the strike and shutdown activity is 'protected' or 'prohibited' *may well depend on the view which the federal tribunal takes of the facts.* Bits of testimony are cited at Application, p. 10-12 (which, if believed, might establish 'coercion'

[13] *Marine Engineers v. Interlake Co.*, 370 U.S. 173, 185; *San Diego Unions v. Gorman*, 359 U. S. 236, 244-5; *Garner v. Teamsters Union*, 346 U.S. 485, 501; "Problems of Policing Pre-emption," 18 *Rutgers Law Rev.* 78, 84-5.

[14] *Plumbers' Union v. Borden*, 373 U.S. 690, 697.

[15] Reply of International Union of Operating Engineers to Petitioners' Application for Writ of Error, p. 10.

> of a type not covered by the federal statute). But there was also reams of testimony on behalf of defendants which, if believed, would have established § 7 activity in lawful attempts to effect orderly shutdown in a manner consistent with the federal law . . ."

But here the NLRB necessarily determined that the activity under consideration was neither "protected" nor "prohibited." The Subsection 8 (a) (1) charge against the employer filed with the Board by respondent unions was based upon the contention that petitioners' action in shutting down the plants was "concerted" activity protected by Section 7 and that when the employer discharged petitioners by reason of such activity, it acted "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title," that is, the employer violated Subsection 8 (a) (1) of the Act.

For the same reason, the Subsection 8 (a) (5) charge that the employer had refused "to bargain collectively with the representatives of his employees" concerning reinstatement of the discharged employees, including petitioners, to their jobs raised the issue of whether petitioners' action in shutting down the plants was "concerted" activity protected by Section 7. If it was a "protected" activity, it was a violation of the Act for the employer to refuse to bargain collectively; if it was not a "protected" activity, the employer was not required to bargain collectively about reinstatement of the discharged employees.

Likewise, the Subsections 8 (a) (1) and 8 (a) (3) charges against the employer filed with the Board on behalf of the discharged employees, including petitioners, necessarily were based upon the claim that petitioners' activity in shutting down the plants was "concerted" activity protected by Section 7 and that when the employer discharged petitioners by reason of such activity, it acted "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title" (thereby violating Subsection 8 (a) (1) of the Act) and that such discharge was also "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" (in violation of Subsection 8 (a) (3) of the Act).

It follows that when the Board found that there was "insufficient evidence of violations to warrant further proceedings" the Board necessarily determined that the activity of petitioners was not "concerted" activity protected by Section 7. If the Board had found that the action of petitioners was such "concerted" activity within the meaning of Section 7, it would necessarily have found that the employer had violated Subsections 8 (a) (1), (a) (3) and (a) (5) of the Act. By making the "insufficient evidence" finding the Board determined that there was not enough evidence of an unfair labor practice within the purview of the Act even to warrant an investigation.

In the courts below respondent unions contended that the controversy between petitioners and re-

spondent unions "is arguably subject" to the jurisdiction of the NLRB because it might be claimed that respondent unions "coerced" petitioners into shutting down the plants, thereby violating Subsection 8(b) (1) (A) providing that it "shall be an unfair labor practice for a labor organization or its agents to . . . restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7 of this title." But, as already clearly shown, the Board found that petitioners' action in shutting down the plants was not "concerted" activity protected by Section 7. If it had been such protected activity, the employer would have violated Subsections 8 (a) (1), (a) (3) and (a) (5) in discharging petitioners and in refusing to bargain collectively about their reinstatement. Therefore, admitting *arguendo* that respondent unions "coerced" petitioners into shutting down the plants, the matter is not "arguably subject to" the jurisdiction of the Board because the Board has found that petitioners' action in shutting down the plants was not "concerted" activity protected by Section 7.

The crux of this controversy is whether or not the activity involved, petitioners' action in shutting down the gasoline plants, was "concerted" activity protected by Section 7 of the Act. As respondents argued below, "there was also reams of testimony on behalf of defendants [respondents] which, if believed, would have established §7 activity in lawful attempts to effect orderly shutdown in a manner consistent with the federal law . . . "[15a] Inso-

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[15a] See note 15 and pages 12-13, *ante*.

far as respondent unions are concerned, the difficulty is that the NLRB was given the opportunity to make a finding favorable to respondents, but either was not presented with the "reams of testimony" referred to by respondents, or did not believe such testimony.

We are not unmindful of the fact that as postulated by the complaints filed with the NLRB the controversy there was one between respondent unions and their members, including petitioners, on the one hand, and the employer on the other hand, whereas, here, the adversaries are respondent unions and petitioners. But this is of no importance whatsoever because the issue is precisely the same: Was the activity involved, the shutting down of the plants by petitioners, "concerted" activity "protected" by Section 7 of the Act? That question was presented to the Board and it found there was "insufficient evidence" that the activity was protected by Section 7.

It should be remembered that, as stated by the Regional Director, the activity under consideration "has been carefully investigated and considered" through the Board's experts, who used the specialized procedures and techniques available to this administrative body appointed by law and informed by experience.

Plainly the primary jurisdiction rule as announced by this Court and other courts in the federal system has been satisfied[16] and, if the require-

[16] *Texas & Pacific Ry. Co. v. Cotton Oil Co.*, 204 U.S. 427; *U.S. Navigation Co. v. Cunard Steamship Co.*, 284

ments of the primary jurisdiction rule have been met, the preemption doctrine simply is inapplicable. What conflict with the regulatory scheme adopted by Congress when it enacted the Taft-Hartley Act can result by allowing state courts to take jurisdiction over matters that the NLRB has held do not even warrant the issuance of a complaint because of "insufficient evidence" of an unfair labor practice?

In *Plumbers' Union v. Borden*, 373 U.S. 690, this Court said: "In the present case the *conduct* on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards." (373 U.S. 698; emphasis by the Court.) Here, "the *conduct* on which the suit is centered" *was* considered by the Board; and the Board determined "there was insufficient evidence" of any conduct within the purview of the Act.

In *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, respondent was caught in the crossfire of a dispute between petitioner, the International Association of Machinists (IAM), and the Millwrights. Petitioner called a strike and respondent filed a charge of an unfair labor practice under Subsection

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U.S. 474; *Garner v. Teamsters Union*, 346 U.S. 485; *Adler v. Chicago & Southern Air Lines* (D.C., E.D. Mo.), 41 Fed. Supp. 366; *Constantin v. Martin* (C.A. 10), 216 Fed. 2d 312; 3 Davis, *Administrative Law Treatise*, Sec. 19.01, pp. 1-6.

8(b)(4)(D) of the Taft-Hartley Act. The NLRB quashed the notice of a hearing, holding that no "dispute" existed within the meaning of the invoked subsection.

After it had filed the charge with the Board but before the Board had acted upon it, respondent sought an injunction against the IAM in the state court, alleging that the strike constituted a secondary boycott under the common law of the State of Missouri and also was in violation of Subsections (A), (B) and (D) of Subsection 8(b)(4) of the Taft-Hartley Act.

The Missouri Supreme Court held that an injunction was properly issued and referred to the ruling of the Board as a determination that no labor dispute existed between the parties and that no unfair labor practices were involved.

This Court held that the preemption rule applied because in the proceeding before the Board (D) was the only subsection alleged to have been violated, whereas in its complaint respondent alleged violation of Subsections (A) and (B). Said the Court:

> "We do not mean to pass on the question whether the Board, by finding that no violation of (D) was involved, inferentially ruled that other subsections were or were not violated. The point is rather that the Board, and not the state court, is empowered to pass upon such issues in the first instance. If a ruling on (D) *necessarily encompassed a ruling on the other subsections*, we would have a different case. But the ruling

> on (D) was based on the finding that no 'particular work' was involved—a phrase of (D) that is absent in (A) and (B). Congress has lodged in the Board responsibility for determining in the first instance whether the same considerations apply to (A) or (B) as apply to (D)." (348 U.S. 478.)

Here the ruling of the Board "necessarily encompassed" the finding that petitioners' action in shutting down the gasoline plants was not "concerted" activity protected by Section 7. Since *no* unfair labor practice was or could have been involved unless the contrary were true, the Board necessarily determined that the conduct under consideration was not an unfair labor practice within the meaning of *any* provision of the Act.

(2) *The cause should be placed on the summary calendar.*

That the primary jurisdiction rule has been satisfied, with the consequence that the preemption doctrine is inapplicable, is so plain that we respectfully submit that under Rule 44(3) the cause should be placed on the summary calendar. In many instances this summary procedure has been utilized by the Court to reverse state court decisions erroneously enlarging state jurisdiction;[17] and it is suggested that this device should be here used to correct a state court decision erroneously restricting state jurisdiction.

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[17]Illustrative are: *Bogle v. Jakes Foundry Co.*, 362 U.S. 401; *McMahon v. Milam Mfg.* Co., 368 U.S. 7; *Waxman v. Virginia*, 371 U.S. 4.

(3) *The preemption rule is inapplicable because the case focuses on "internal union matters . . . not having to do directly with matters of employment."*

The foregoing quotation from *Borden*[19] is plainly applicable and would take the cause out of the scope of the preemption rule even though the issues had never been presented to the NLRB. The findings of the jury, pp. 6-7, *ante*, that under state practice constitute the *sole* basis for the judgment rendered against respondent unions by the trial court, establish that petitioners would not have shut down the gasoline plants had not agents of respondent unions ordered them to do so; and would not have taken such action had not agents of the unions represented to petitioners that when a strike is called the law requires that the plants where petitioners are working be shut down by petitioners and that if petitioners lost their jobs by reason of shutting the plants down they would get their jobs back or jobs of equal pay value. The findings established that petitioners would not have shut the plants down if the orders *alone* had been given and that they would not have shut the plants down if the misrepresentations *alone* had been made.

Under the foregoing findings, "internal union matters, *i.e.*, on relations between [petitioners and respondent unions] not having to do directly with matters of employment" are involved.[20]

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[19]*Plumbers' Union v. Borden*, 373 U.S. 690, 697.

[20]See Note 19.

In *Borden* the union was one of the three participants in the employment process. The employer requested an employee; the union referred an employee to the employer; and the employee accepted the employment. As succinctly argued in the union's brief in that case in this Court, "The Union referral system . . . is a traditional institution" but one that requires supervision by the Board so that "the values of the system to both industry and labor are . . . preserved while the discriminations sometimes arising in its operation are proscribed."[20a]

In the instant case no employment practices are involved. In ordering petitioners to shut down the plants and in making misrepresentations to petitioners, respondent unions were in no way participating in the employment process. There is no evidence and no jury finding that respondent unions were seeking to get petitioners discharged or that respondents held any animosity whatsoever toward petitioners. There was no occasion at all for the Board to supervise the activity so that "values of the system to both industry and labor are . . . preserved." In fact, the criminal union activity complained of by petitioners (see pp. 23-4, *post*) has no "values" to either industry or labor.

In the instant case "employment" comes into the picture only because petitioners lost their jobs by acting in reliance upon respondent unions' misrepresentations to petitioners. That respondent unions did

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[20a]Brief for Petitioners, pp. 10-11.

not intend that petitioners lose their jobs is proved by the fact that respondents filed complaints with the Board attempting to get petitioners reinstated to their jobs. (See pp. 7-8, *ante*.) That petitioners did not intend to lose their jobs is proved by the jury findings that they shut down the plants in reliance upon representations by the unions that if petitioners lost their jobs they would get them back or would get jobs of equal pay value.

The long and short of the matter is that the instant case in no way has "to do directly with matters of employment." Employment enters the picture only because the jury was required to consider petitioners' loss of employment in arriving at damages.

(2) *No question of "coercion" by respondent unions in violation of the Act is presented.*

Nor is the issue of "coercion" by respondent unions a facet of this case, thereby bringing it within the potential jurisdiction of the Board as an unfair labor practice prohibited by Subsection 8(b)(1)(A), providing that "It shall be an unfair labor practice for a labor organization or its agents . . . to restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7 of this title." While respondents made this contention below (see pp. 12-13, *ante*), there is no support whatsoever for it.

In the first place, as clearly reflected by the jury's findings (see pp. 6-7, *ante*), petitioners shut the plants down after the strike had begun and at a

time when they were trespassing upon the property of their employer in violation of state law (see pp. 23-4, *post*). Consequently, it is perfectly plain that in shutting down the plants petitioners were not engaged in "concerted" activity protected by Section 7.

In the second place, there is no evidence and no jury finding that the unions "coerced" petitioners as the word "coerce" is used in Subsection 8(b)(1)(A). As made plain by the decisions of this Court, the "coercion" proscribed by the Act involves more than a union's giving an order to one of its members. In *Labor Board v. Drivers' Local Union*, 362 U.S. 274, this Court held that Subsection 8(b)(1)(A) was drafted to prohibit "union organizational tactics tinged with violence, duress or reprisal" and "the use of repressive tactics bordering on violence or involving particularized threats of economic reprisal;" that the section "is a grant of power to the Board limited to authority to proceed against union tactics [against employees] involving violence, intimidation and reprisal or threats thereof—conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes." (362 U.S. 286, 287, 290.)

(5) *Jurisdiction to prevent violence lay in the state courts.*

Finally, *Borden* involved no violence or breach of the peace. The union simply declined to refer Borden to the employer, thereby no more endangering the

public peace than would the breach of any other contractual obligation by a contracting party.

Here the action of respondent unions resulted in a trespass by petitioners upon the property of their employer, with consequent destruction of property (the employers' damages were $25,000.00 or more) and with the possibility of injury to individuals. The trespass and resulting damages were expressly prohibited by Article 5153, *Vernon's Texas Statutes*, Appendix D, p. 16d, of the Appendices, providing that no member of a labor union shall invade or trespass upon the premises of another without the consent of the owner thereof; and the joint action of petitioners resulting from the misrepresentations of respondent unions was an unlawful assembly, in violation of Article 439 of the *Texas Penal Code*, Appendix D, p. 17d, of the Appendices.

That state jurisdiction exists to preserve the public peace and to prevent violence is established by the decisions of this Court.[21] That rule has been recently reaffirmed.[22]

(6) *The state courts had jurisdiction to determine the nature of the activity involved.*

Respondents' basic contention apparently is that, whereas the findings of the jury may establish ac-

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[21] *Auto Workers v. Wisconsin Board*, 351 U.S. 266, 274; *United Workers v. Laburnum Corp.*, 347 U.S. 656, 664; *Automobile Workers v. Russell*, 356 U.S. 634; *NLRB v. Electrical Workers*, 346 U.S. 464.

[22] *Teamsters Local 20 v. Martin*, 12 L.Ed. 2d 280, 285, 84 Sup. Ct. 348.

tivity not "arguably subject to" the jurisdiction of the NLRB, nevertheless the Board, if given the opportunity to do so, might have viewed the facts in a different light and might have found the activity subject to its jurisdiction. (See pp. 12-13, *ante*.) As already shown, pp. 7-8, *ante*, precisely the contrary is true; the Board was given the opportunity to make such findings and found that there was "insufficient evidence" of any unfair labor practice within the purview of the Act. But the point we make here is that the preemption rule does not mean that in each and every case the state courts are deprived of jurisdiction *to determine what the facts are* and to conclude that the found facts do not bring the controversy within the potential jurisdiction of the Board.

It is submitted that the preemption rule requires only that the Board determine whether specific activity is "protected" by or "prohibited" by the Act. The nature of the activity may be established without dispute, but whether or not the established activity is "protected" or "prohibited" is for the Board *if there is any room for doubt about the matter.*

But the foregoing does not mean that in every case involving a controversy between a union and one of its members the union can make the case one that is "arguably subject to" the jurisdiction of the Board merely by pleading facts that, if established, would do so; or merely by presenting testimony that, if believed, would do so. It is for the trier of fact in which the litigation is brought, in this case the state court, to determine what activity or conduct is involved. Once it has made the determination, the preemption

rule is applicable *unless it is clear that the conduct or activity is neither "protected" nor "prohibited" by the Act.*

In nearly every case involving the issuance of a state court injunction to prevent violence during a strike, the union has contended that there was no violence; that only peaceful picketing was involved. Yet this Court has never held that in such a situation the state court is powerless to act because the conduct or activity is "arguably subject to" the jurisdiction of the Board. In the cases cited in footnote[21] the state court determined that conduct involving violence was involved; and in none of them did this Court hold that the preemption rule was applicable because it was for the Board to determine in the first instance whether or not violence was involved.[22]

The point we make is well put in the dissenting opinion in *Day v. Northwest Division* 1055, *etc.*, ____ Or.____, 389 Pac. 2d 42. In considering the "arguably subject to" rule the dissenting judge said: "An examination of each of these cases discloses that the word 'arguably' was used by the Court in the primary sense as a word of art, to describe the existence of an uncertainty as to whether an act or

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[22]In *Automobile Workers v. Russell*, 356 U.S. 634, 638, the Court said: "There was much conflict in the testimony as to what took place in connection with the picketing but those conflicts were resolved by the jury in favor of Russell. Accepting a view of the evidence most favorable to him, the jury was entitled to conclude that petitioners did, by mass picketing and threats of violence, prevent him from entering the plant and from engaging in his employment from July 18 to August 22."

practice, not specifically defined in the Act, engaged in by one of the disputing parties would be protected or not protected within the policy intent of the Act." (_____ Or. _____, 389 Pac. 2d 50.) In other words, the dissenting justice was stating that, once the trier of fact has found the nature of the "act or practice," the "arguably subject to" rule is applicable unless *it is clear* that the act or practice is neither "protected" nor "prohibited" by the Act.

WHEREFORE, petitioners pray that a Writ of Certiorari issue to the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas, and, in the alternative, petitioners pray that a Writ of Certiorari issue to the Supreme Court of Texas.

Respectfully submitted,

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Counsel for Petitioners

Proof of Service

I, Albert Smith, one of the attorneys for James M. Casida, et al., petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of February, 1965, I served copies of the foregoing Petition for Writ of Certiorari to the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas on the several parties thereto as follows:

(1) On International Union of Operating Engineers, AFL-CIO, a respondent herein, by mailing a copy in a duly addressed envelope with postage prepaid to Mullinax, Wells, Morris & Mauzy, 1601 National Bankers Life Building, Dallas 1, Texas, and to Woll, Mayer & St. Antoine, 736 Bowen Building, Washington 5, D. C.

(2) On Local 351, International Union of Operating Engineers, AFL-CIO, the other respondent herein, by mailing a copy in a duly addressed envelope with postage prepaid to Arthur Mitchell, 400 First Federal Savings Building, 11th and San Jacinto Streets, Austin, Texas, and to Sam Houston Clinton, Jr., 205 May Building, 308 West 11th Street, Austin, Texas.

Albert Smith
909 Great Plains Building
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Attorney for James M. Casida, et al.

APPENDICES

I.

Appendix A

INTERNATIONAL UNION OF OPERATING ENGINEERS et al.,

Appellants

v.

JAMES M. CASIDA et al.,

Appellees.

No. 7285

Court of Civil Appeals of Texas,

Amarillo

Feb. 3, 1964

Rehearing Denied March 30, 1964

DENTON, Chief Justice.

This suit for damages was brought by James M. Casida and 27 other former employees of Phillips Petroleum Company against the International Union of Operating Engineers, Local Union No. 351, an affiliate of that International Union, and certain union officials. Appellees, plaintiffs below, sought damages alleged to have been sustained by each of

them by reason of being discharged by Phillips Petroleum Company for carrying out certain orders of named union officials. The two union defendants impleaded Phillips Petroleum Company as a third party defendant. Prior to the submission of the case to the jury, plaintiffs took nonsuits as to the union officials. Phillips' motion for summary judgment also was granted prior to the trial of the case on its merits. The jury awarded damages to the individual plaintiffs in varying amounts ranging from $24,158.40 to $78,891.20 for an aggregate sum of $1,186,568.40. The trial court rendered judgment jointly against the unions in accordance with the jury verdict.

All 28 plaintiffs were employed by Phillips Petroleum Company and were members in good standing of Local 351 which was chartered by and affiliated with the International Union. Local 351 had been certified as the bargaining representative with Phillips by the National Labor Relations Board. It is undisputed that the activities here involved affected interstate commerce. The union contract with Phillips was to have expired May 1, 1958, but by written agreement it was extended two weeks to May 15 in order that negotiations could continue. Either party could terminate this supplemental agreement by giving twenty-four hours written notice. Further negotiations failed to produce an agreement and the union voted to strike. The strike was set for May 14, 1958, at 9:00 o'clock p.m. Notice of the union's intention to strike was timely given to the company. The 28 plaintiffs together with 5 other union members, were employed by Phillips in

the gasoline department, and in such capacity they were operators in several of the company's gasoline plants. When the strike began these 33 operators began "shutting down" the plants contrary to orders of Phillips' supervisors. For such action these 33 members were discharged by the company for insubordination. 28 of the 33 discharged employees brought this suit for damages.

The crux of appellees' cause of action is that their carrying out of certain orders or instructions of certain alleged union officials to shut down the gasoline plants caused their discharge. Plaintiffs alleged union attorney Clinton advised union members prior to the strike, "When a strike is called, you are required by law to shut the plants down. The company can fire you, but they can't make it stick, you will get your job back or one equal to its pay value." These same orders were also alleged to have been given the union members by L. V. McCarthy, the local union's business representative; by E. E. Looney, the local's vice president; by C. V. Holley, a union member and the local's chairman of the gasoline department; and by Joe W. Rigdon, the International Union's representative. Plaintiffs' pleadings, evidence, and the jury findings were to the effect these orders or representations were material, false, and relied on by each of the plaintiffs. They further alleged the union breached an implied agreement with the union members to properly represent them and to use at least ordinary care to inform them fairly and accurately concerning negotiations between the union and the company; the proper man-

ner to carry out a strike; duties they owed to the employer in carrying out a strike; and the right of the company to discharge an employee who shuts down a plant contrary to employer's instructions. Plaintiffs alleged "these covenants are inherent in the contractual relationship created when the plaintiffs joined the defendant unions and are implied by law." They further allege "but for the aforesaid orders [by the union officials] these plaintiffs would not have shut the plants down and would not have lost their jobs." The only relief sought by these union members is money damages. Each plaintiff voluntarily took his "withdrawal card" from the union, and they make no request for reinstatement into the union.

[1] Appellant unions first challenge the State court's jurisdiction, contending the subject matter of this case is within the exclusive jurisdiction of the National Labor Relations Board. This plea to the jurisdiction was overruled by the trial court and has been re-asserted here. The United States Supreme Court held in Local 100 of United Association of Journeymen v. Borden, 373 U.S. 690, 83 S. Ct. 1423, 10 L. Ed. 2d 638 (1963): "Thus the first inquiry, in any case in which a claim of federal preemption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance." In the same opinion the court uses the phrase "reasonably arguable" in determining whether the conduct complained of comes within the Board's jurisdiction.

In the present case plaintiffs allege and the jury found that the instructions given by the union officials to plaintiffs were relied on by them, and that the carrying out of such instructions was the cause of their discharge by Phillips. Plaintiffs further allege and the jury found the named union officials entered into an unlawful conspiracy and gave the instructions above referred to in order to cause Phillips' plants to be shut down. Plaintiffs contend by brief "The heart of their case lies in the defendant unions' failure to perform common law duties to their members." These alleged common law duties are described as the unions' negligent and otherwise wrongful order to immobilize the plants in the face of clear and definite instructions to the contrary by supervisors of the employer. This is the basis of appellees' contention that the State court has jurisdiction of this present suit. As we understand it, appellees urge that these alleged common law duties owed by the union to its members represent a matter concerning the relationship between the unions and their members, thus taking the activity complained of out of the jurisdiction of the National Labor Relations Board. The assertion by brief that appellees "are not charging defendants with having coerced them into participating in the strike, the picketing, *or any other activity covered by the National Labor Relations Act.*" (Emphasis added) is not consistent or compatible with the pleadings, evidence and jury finding. Admittedly, all plaintiffs took part in the strike vote, voluntarily struck and participated in the picketting which took place during the strike. The question of whether or not there

was coercion by the union relative to "any other activity" must be decided in disposing of this jurisdictional question.

Relevant sections of National Labor Relations Act,[1] commonly referred to as the Taft-Hartley Act, provides:

Sec. 157 [Sec. 7, 49 Stat. 452]

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

Sec. 158 [Sec. 8, 49 Stat. 452]

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules which [with?] respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes

[1] 49 Stat. 542, as amended, 29 U.S.C. §§ 157, 158.

of collective bargaining or the adjustment of grievances."

We have concluded the conduct alleged to have been committed by the union officials arguably comes within the protection afforded by Section 7 of the Act. Two recent decisions of the United States Supreme Court in Association of Journeymen v. Borden, supra, and Local No. 207, etc., Iron Workers Union v. Perko, 373 U.S. 701, 83 S. Ct. 1429, 10 L.Ed. 2d 646, are controlling authorities on this question of preemption. See also San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S. Ct. 773, 3 L.Ed. 2d 775. Plaintiffs rely on International Association of Machinists v. Gonzales, 356 U.S. 617, 78 S. Ct. 923, 2 L.Ed. 2d 1018, among other cases. But the court in Borden distinguished Gonzales on the ground that decision turned on the court's conclusion that the suit was focused "on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment, and that the principal relief sought was restoration of union membership rights." In the Borden case, Borden, a member of a Louisiana local of the Plumbers' union, attempted to secure a job with a construction company in Dallas on a particular construction project. The company hired employees through union referrals. Borden was unable to obtain such a referral from the business agent of the defendant Dallas local even though Borden had clearance between the two locals and the company foreman had asked that Borden be sent to the job. Borden brought suit against the union in a Dallas State court seeking damages under the

State law for the union's refusal to refer him to the company. The union challenged the State court's jurisdiction as was done in the present case. The United States Supreme Court held the State court had no jurisdiction since it was arguable that the union's conduct either violated or was protected by the National Labor Relations Act. In so holding, the court used the following language: "The suit involved here was focused principally, if not entirely, on the union's actions with respect to Borden's efforts to obtain employment. No specific equitable relief was sought directed to Borden's status in the union, and thus there was no state remedy to 'fill out' by permitting the award of consequential damages. The 'crux' of the action (Gonzales, 356 U.S., at 618, 78 S. Ct., at 924 [2 L.Ed. 2d 1018] concerned Borden's employment relations and involved conduct arguably subject to the Board's jurisdiction." The court also rejected Borden's contention that the suit for damages was one based on contract and tort, thus conferring the State court jurisdiction. In disposing of this contention, the court said: "It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction. Rather, as stated in Garmon, supra, 359 U.S. at 246, 79 S. St. at 780 [3 L.Ed. 2d 775], '[o]ur concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered.' (Emphasis added.)"

Thus, in the present case the area of conduct complained of is the giving of the order to shut down the plants to the union members which resulted in their

being discharged. Plaintiffs' loss of employment with Phillips and their inability to obtain and retain similar employment is the crux of their cause of action. No equitable relief such as restoration of union membership rights is being sought. Section 7 of the Act protects employees in their engaging in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8 (b) (1) makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title." When the 28 union members shut down the Phillips gasoline plants on orders of the union officials, they were engaging in "concerted activities." Under Section 7 these plaintiffs had "the right to refrain from any or all of such activities." It is the alleged coercion by union officials that dictated the actions of the plaintiffs contrary to their specific right to refrain from such activity which forms the basis of plaintiffs' complaint.

In the Perko case which also involved an alleged conspiracy to deprive the union member of the right to continue to work, the Supreme Court said: "As in Borden, the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations and was not directed to internal union matters. * * * Thus there was no permissible state remedy to which the award of consequential damages for loss of earnings might be subordinated." This and other holdings cited above are controlling under the pleadings, evidence, and jury findings in the instant case.

In determining this jurisdictional question we are not called upon, and we make no finding of the substantive question, that is, whether either the local or International Union was guilty of a violation of the Act. We do conclude, and so hold, that the subject matter of this case "arguably" comes within the jurisdiction of the National Labor Relations Board to deal with unfair labor practices. It therefore follows the State court is without jurisdiction to hear and determine the merits of this case and must defer jurisdiction to the Board.

In view of our conclusion that the State court is without jurisdiction, it becomes unnecessary to consider and pass on the remaining points of error presented in this voluminous record.

The judgment of the trial court is accordingly reversed and rendered.

Reversed and rendered.

II.

Appendix B

IN THE SUPREME COURT OF TEXAS

No. A-10153

JAMES M. CASIDA ET AL,

Petitioners,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, AND LOCAL 351, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Respondents.

PER CURIAM

ON APPLICATION FOR WRIT OF ERROR

This is a suit by twenty-eight former members of a labor union against their union. The trial court gave judgment on a jury verdict in favor of the plaintiffs. The Court of Civil Appeals reversed such judgment, holding that the area of conduct in question was pre-empted from state law by federal legislation. 376 S.W. 2d 814.

We refuse to grant this application for writ of error solely on the ground that the conduct in ques-

tion is arguably subject to the jurisdiction of the National Labor Relations Board. See Local 100, United Association of Journeymen v. Borden, 373 U.S. 690 (1963). Hence, the application for writ of error is Refused, No Reversible Error.

III.

Appendix C

IN THE SUPREME COURT OF TEXAS

No. A-10153

JAMES M. CASIDA ET AL,

Petitioners,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, AND LOCAL 351, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Respondents.

PER CURIAM

ON APPLICATION FOR WRIT OF ERROR

This is a suit by twenty-eight former members of a labor union against their union. The trial court gave judgment on a jury verdict in favor of the plaintiffs. The Court of Civil Appeals reversed such judgment, holding that the area of conduct in question was pre-empted from state law by federal legislation. 376 S.W. 2d 814.

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tion is arguably subject to the jurisdiction of the National Labor Relations Board. See Local 100, United Association of Journeymen v. Borden, 373 U.S. 690, 83 S. Ct. 1423, 10 L.Ed. 2d 638 (1963); San Diego Building Trades Council, etc. v. Garmon. 359 U.S. 236, 79 S. Ct. 773, 3 L.Ed. 2d 775; Iron Workers Union v. Perko, 373 U.S. 701, 83 S. St. 1429, 10 L.Ed. 2d 646. Compare International Association of Machinists v. Gonzales, 356 U.S. 617, 78 S. Ct. 923, 2 L.Ed. 2d 1018. Hence, the application for writ of error is Refused, No Reversible Error.

Opinion delivered: July 29, 1964.

IV

Appendix D

A. Federal Statutes

(1) *Section 7 of Labor Management Relations Act.*

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this title.

(2) *Pertinent Subsections of Section 8 of Labor Management Relations Act.*

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this title;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 of this title. . . . .

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

B. Texas Statutes

(1) *Article 5153, Vernon's Texas Stats.*

It shall be lawful for any member or members of such trade union or other organization or association, or any other person, to induce or attempt to induce by peaceable and lawful means, any person to accept any particular employment or to enter or refuse to enter any pursuit or quit or relinquish any particular employment or pursuit in which such person may then be engaged. Such member or members shall not have the right to invade or trespass upon the premises of another without the consent of the owner thereof.

(2) *Article 439 of the Texas Penal Code, a Part of Title 9—Offenses Against the Public Peace.*

An "unlawful assembly" is the meeting of three or more persons with intent to aid each other by violence or in any other manner either to commit an offense or illegally to deprive any person of any right or to disturb him in the enjoyment thereof.

V

Appendix E

October 29, 1958

Mr. Joe W. Rigdon, Asst. Int'l Repr.
Local 351, International Union of
Operating Engineers
111 East Coolidge Street
Borger, Texas

Re: Phillips Petroleum Company
Case No. 16-CA-1115

My dear Mr. Rigdon:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation it appears that, because there is insufficient evidence of violation, further proceedings are not warranted at this time. I am, therefore, refusing to issue complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations (Section 102.19) you may obtain a review of this action by filing a request for such review with the General Counsel of the National Labor Relations Board, Washington 25, D. C., and a copy with me. This request must co in a complete statement setting forth the facts and reasons

upon which it is based. The request should be filed within ten (10) days from the date of receipt of this letter, except that the General Counsel may, upon good cause shown, grant special permission for a longer period within which to file.

Sincerely,

Edwin A. Elliott
Regional Director

VI

Appendix F

March 13, 1958

Marion Ladwig, Esquire
505 Scanlan Building
Houston, Texas

Re: Phillips Petroleum Company
Cases Nos. 16-CA-1115 thru
1146
16-CA-1149 and 1150

Dear Mr. Ladwig:

Your appeal from the Regional Director's refusal to issue complaint in the above cases, charging violations of Section 8 (a) (1), (3) and (5) of the National Labor Relations Act, has been duly considered by the General Counsel.

The General Counsel sustains the ruling of the Regional Director. Like the Director, the General Counsel concludes that there is insufficient evidence of violations to warrant further proceedings.

Very truly yours,

Thomas J. Ryan
Special Assistant to the
General Counsel

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No. 887

In the

Supreme Court of the United States

OCTOBER TERM, 1964

JAMES M. CASIDA, *et al*,

Petitioners,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, AND LOCAL 351, INTERNATIONAL UNION OF OPERATING ENGINEERS, *AFL-CIO*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF FOR RESPONDENTS IN OPPOSITION

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REILLY PUBLISHING COMPANY — 1711 S. HARWOOD — DALLAS, TEXAS — HA 8-5385

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In the

Supreme Court of the United States

OCTOBER TERM, 1964

No. 897

JAMES M. CASIDA, *et al*,

Petitioners,

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, AND LOCAL 351, INTERNATIONAL UNION OF OPERATING ENGINEERS, *AFL-CIO*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE SEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

BRIEF FOR RESPONDENTS IN OPPOSITION

International Union of Operating Engineers, (herein "International") and Local 351 of the International Union of Operating Engineers (herein "Local 351"), respectfully oppose the grant of certiorari herein.

Opinions Below

The opinion of the Texas Court of Civil Appeals (App. A of Petition) is reported at 376 S.W. 2d 814. The opinion of the Supreme Court of Texas (App. C of Petition) is reported at 383 S.W. 2d 571.

Jurisdiction

The jurisdictional requisites are set out in the petition.

QUESTION PRESENTED

May a state court impose a damage award in favor of union members against a labor union, certified under the federal law as exclusive bargaining agent, for conduct of union agents in "ordering" union members to engage in concerted strike and plant shutdown activity, and in making representations to the union members as to the means of carrying out a concerted strike activity?

Is the conduct of union agents in issuing such orders, and making such representations arguably subject to the federal labor laws, and thus preempted from state jurisdiction?

Statute Involved

The pertinent provisions of the Labor Management Relations Act of 1947, as amended [29 USCA §151ff.] are set out in the petition at pp. 15d and 16d.

STATEMENT

Claiming that they were coerced into strike and plant shutdown activity in which they had no desire to engage and which resulted in their discharge, plaintiffs sought damages in a Texas state court, from the union of which they were members.

Specifically they alleged that union agents "ordered" plaintiffs to shutdown their equipment and go on strike against Phillips Petroleum Corp., and faced with fine or expulsion from the union if they failed to follow union orders, plaintiffs shut the plants down and went on strike. They further alleged that union agents misrepresented the proper manner in which they should strike, thus causing plaintiffs to take certain concerted strike activity (plant shutdown) against their will, and that as a result of this concerted action the plaintiffs lost their jobs. See Transcript Vol. I, pp. 92ff., particularly at pp. 98, 101; 105-106.

Plaintiffs further complained that union agents failed to "inform them fairly and accurately" concerning collective bargaining, the plans with respect to shutdown, the proper manner to carry out a strike, the things they could rightfully do in carrying out a strike, their duties in carrying out a strike, and the employer's right to discharge an employee who in going on strike shuts down a plant contrary to instructions (Tr. Vol. I, p. 98).

Plaintiffs made no attempt to charge their unions before the NLRB; though, as we detail, *infra*, pp. 7-8, their allegations if true, would have held unions for violation of §§8(b)(1) and (2) of the Taft-Hartley law. 29 USCA §158(b)(1),(2).

The Texas jury found by a special issue verdict for plaintiffs that union agents had issued "orders" and engaged in misrepresentations as to plaintiffs' rights as a result of which plaintiffs involuntarily

engaged in concerted plant shutdown resulting in their discharge, and awarded over a million dollars in damages. See Tr. Vol. VII, pp. 11ff.

Thus the conduct which plaintiffs alleged, and the jury found as basis for liability was union restraint of employees in the exercise of their federal rights to refrain from union activity.

The Texas Court of Civil Appeals, after quoting from this Court's holding in *Borden*, 373 U.S. 690, that the concern in pre-emption cases is with "delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered," 376 S.W. 2d at 818, quoting 10 L.Ed. 2d at 644, noted: "Thus in the present case the area of conduct complained of is the giving of the order to shut down the plants to the union members which resulted in their being discharged." 376 S.W. 2d at 818. The Texas Court of Civil Appeals concluded that the conduct arguably comes either within the protection afforded by §7, or the prohibition of §8(b)(1) of the federal Act and held that "the State Court is without jurisdiction." 376 S.W. 2d at 818.

The Supreme Court of Texas by *per curiam* opinion held "that the conduct in question is arguably subject to the jurisdiction of the National Labor Relations Board," and refused writ of error, 383 S.W. 2d 571.

ARGUMENT

1.

The Decisions Below are Clearly Correct

The conduct here at issue, the activities of union agents in communicating with union members with respect to the conduct of a strike aimed at enforcing bargaining demands against an employer engaged in interstate commerce, is clearly within the federal statute.

Such activities are either "protected" as necessary to the exercise of §7 rights to engage in concerted activities;[1] or "prohibited" as restraint of employees who prefer to exercise their §7 right not to engage in concerted activities.[2]

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[1] If, as union contended, the representations which the plaintiffs claim actionable were made in a context of reasonable anticipation that Phillips would agree to, and in cooperation with union would effect an orderly shutdown, such representations and advice that employees should not walk off and leave volatile equipment running—but should see that it was shut down properly, was proper advice based on decisions of NLRB. See *In re Reynolds-Manley Lumber Co.*, 104 NLRB 827. Cf. *In re Marshall Car Wheel & Foundry*, 107 NLRB 314, reversed on other grounds, 218 F. 2d 409 (C.A. 5, 1955).

[2] See *In re Warehouse & Distribution Workers Local*, 207, 118 NLRB 342 (1957), where it was held:

> "Section 7 of the [Federal] Act guarantees employees the right to refrain from assisting a labor organization in its strike or other concerted activities"

Or, as the Fifth Circuit stated in judicially approving an earlier ruling of NLRB in *NLRB v. Wood Workers etc, Union*, 243 F. 2d 745 (C.A. 5, 1947):

> "Section 7 [of the federal Act] provides that employees have the right to engage in concerted activity, and also have the right to refrain from any of these activities. The right to engage in these activities of course includes the right to strike and picket; the right to refrain from them includes the right to work in the face of a strike. *In re Sunset Line & Twine Co.*, 79 NLRB 1487, 1504."

Or, as the Second Circuit held in *NLRB v. Bell Aircraft Corporation*, 206 F. 2d 235, 237 (C.A. 2, 1953):

> "* * * Section 7 [of the federal Act] gave Finch the right to take part

(Footnote No. 2 continued on next page.)

To permit a state court to apply state law to such conduct not only deprives unions of the procedural safeguards written into the federal statute [e.g. the six months' limitation proviso of §10(b); and the protections of 8(c) which validates the utterance of opinion or other statement which does not contain threat of reprisal or promise of benefit]; it permits a state court jury to void §7 rights and encumber the entire collective bargaining process by the imposition (as here) of a damage judgment of over a million dollars against the federally certified bargaining agent. The very collective bargaining process which the federal Act seeks to protect is jeopardized—indeed obliterated—if the notions of a Texas jury as to the proprieties of communications between union agents and union members with respect to strike activities can override the federal statute.

Advice as to shut down which NLRB would hold to be proper union effort in lawful attempt to effect orderly shutdown in a manner consistent with the

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(Footnote No. 2 continued from preceding page.)

in the strike or not as he pleased, and if he chose not to take part in the strike, it was an unfair labor practice for either the employer or the union to interfere with the exercise of that right * * *."

The United States Court of Appeals for the Seventh Circuit described the purpose of Section 7 of L.M.R.A. in this manner:

"Section 7 protects an employee in his right to refrain from concerted activities and this includes, of course, the right to refuse to participate in or recognize a strike. Coercion or interference with that right, whether by the employer or by the union, is made an unfair labor practice by the terms of the Act." *Allen Bradley Co. v. N.L.R.B.*, 286 F. 2d 442, 445 (C.A. 7, 1961).

federal law,[3] has been held by the Texas trial court to be unlawful under Texas law.

Assuming that the "orders" and advice had not been protected, still this is conduct within the federal statute. For even viewed as plaintiffs asserted: "petitioners immobilized Phillips equipment *only under orders from their union officials.*"[4] And further that union rules "required petitioners to obey the orders of their union officials . . ."[5] Plaintiffs' trial pleading asserted:[6] "and faced with a fine and expulsion from the union, or both if they failed to do so, the plaintiffs shut the plant down." Or, as petitioners asserted in their brief below:[7] "Plaintiffs had no choice in the matter. They knew they had to follow those orders, and the same thing would probably happen to them that happened to about 20 others who violated a picket line: expelled with a $10,000 fine each." Again, plaintiffs "offered evidence to show that union membership standing and dues had been used by the union in

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[3] See cases cited in footnote 1, *supra*. Union's evidence showed that union, as in prior labor disputes at the Phillips refinery, anticipated that union and employer would agree to an "orderly shutdown" during the pendency of the strike. If prior practice had been followed, it would have been plaintiffs' responsibility to effect such orderly shutdown before going on strike. Walking off and leaving machinery running unattended in the highly dangerous refinery of volatile gases would have been cause for discharge. *In re Reynolds-Manley Lumber*, 104 NLRB 827.

Employer Phillips did not advise union agents of its intention to keep the refinery operating until *after* union agents had issued the "orders" and made the representations found actionable. S.F. Vol. VII, pp. 388-389; 403; 415; Vol. VIII, pp. 44-46.

[4] Application for Writ of Error, p. 18.

[5] Ibid., p. 18.

[6] Tr. Vol. I, p. 105,

[7] Petitioners' [there Appellees'] Brief to Court of Civil Appeals, p. 202.

the past to get men fired . . ." and accordingly: "these men [plaintiffs] knew that if they failed to follow those union orders, that in the past the union had taken those things to the company, questioned their qualifications, got them discharged, and that they would do it again if they didn't follow the union's orders with reference to shutting that plant down."[8]

Quite clearly in pleading, evidence and briefs below petitioners have asserted that union "orders" or other union restraint or coercion forced petitioners' concerted action, for which they were discharged. Indeed, the basis of this action is that concerted activity in strike and shutdown was the result of restraint and coercion by union agents who misled petitioners into such activity despite the fact that they did not desire to strike, and took the action only at the instance of union "bosses" who coerced them into concerted activity. Any other view flies in the teeth of petitioners' own pleading, evidence, and the jury's finding that petitioners' activities were not voluntary.[9]

So viewed, the activity of which petitioners complain violated 8(b) (1) (A)—for it constituted union restraint or coercion of employees in the exercise of their section 7 rights *not* to engage in concerted activity. See cases in footnote 2, *supra*.

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[8]Petitioners' [there Appellees'] Brief to Court of Civil Appeals, pp. 200-201.

[9]See Jury findings 50(b); Tr. Vol. VII, pp. 85-86; Issues 71-98, Tr. Vol. VII, pp. 109-134.

Viewed either as "protected" or "prohibited" by the federal Act—the result is the same—the conduct is to be judged by federal tribunals under the federal Act, and the state court has no jurisdiction.

2.

Petitioners' "New" Arguments

Ingenious counsel now seek to overturn the clearly correct decisions in the Texas appellate courts by assertion that NLRB has examined the conduct here at issue, refused to act with respect to it, and thus left the state courts free to control it, Petition, p. 9ff.

There are many difficulties with petitioners' new argument. First, it is made for the first time in this Court. Second, it depends upon matters outside the record. Third, no complaint was ever made to NLRB with respect to the union conduct here at issue; accordingly, NLRB did not, and could not have passed upon it.

A.

In the courts below petitioners were arguing that they did not bring charges against the defendant unions under the National Labor Relations Act for, they asserted, "Any such charge would be blocked by the proviso just quoted" [the proviso to §8(b)(1)(A)].[10] Again they asserted below: "There is absolutely no way in which they (petitioners) may

[10]Petitioners' (there Appellees) Brief to Court of Civil Appeals, p. 28, last 2 lines.

proceed against defendants under the National Labor Relations Act."[11] Again they specifically asserted that it was useless for them to seek NLRB relief against these defendants, for, they asserted "They [petitioners] would find resort to the National Labor Relations Board a futile gesture."[12]

Yet petitioners *now* assert that "the requirements of the primary jurisdiction rule have been met, that is [the case is presented to the courts] *after* the NLRB has exercised its jurisdiction and determined that the activity involved is *not* "subject to the protection of §7 or the prohibition of §8 of the National Labor Relations Act," Petition, p. 9.

We find it difficult to reconcile assertions that the matters here in issue were not presented to NLRB, because to do so would be a "futile gesture," with the present assertion that "NLRB has exercised its jurisdiction." Obviously, it has not.

B.

Petitioners append as Appendices E and F to the petition letters relating to NLRB Case 16-CA-1115. These were not admitted in evidence—and have never been considered by the courts below. They were proffered to the trial court in the absence of the jury, solely to perfect a bill of exception for

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[11] Ibid., p. 32.

[12] Ibid., p. 35. This position was reasserted in Petitioners' Application for Writ of Error to the Supreme Court of Texas, at pp. 19-20: where petitioners asserted:

"If petitioners had filed their complaints with the NLRB, as the Court of Civil Appeals would require, the NLRB's answer would have been 'no jurisdiction'."

the *"limited purpose and offered solely and exclusively for the purpose of laying a predicate for the introduction of [another exhibit]," which was also excluded.*[13] Although the trial court stated that he would rule on the admissibility of these letters "as they are at some future time proffered,"[14] they were never thereafter offered in evidence. Since they were outside the record they were, of course, not considered by any of the courts below. Accordingly, they should not be considered here.

C.

Even were this court to go outside the record, it would still be apparent that petitioners made no attempt to charge unions under the NLRA before the Board. Assuming, *arguendo,* a showing that petitioners charged employer, Phillips, with violation of §8(a)(1) and (3) in interfering with Section 7 rights and discrimination in regard to hire or tenure of employment to discourage membership in the union; the NLRB Regional Director's refusal to issue complaint against employer, Phillips, be-

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[13] See S.F. Vol. VIII, p. 84, where petitioners' counsel stated:

"MR. SMITH [counsel for plaintiffs-petitioner]: Your Honor, I understand that and we are not in any sense of the word attempting to get behind the log with the Court. This other material that has been offered here this morning in the absence of the jury has been limited and offered solely and exclusively for the purpose of laying a predicate for the introduction of that portion of the Plaintiffs' Exhibit No. 67, which is, of course, the document that the Court refers to, and that is all.

COURT: Well, I want the record to definitely reflect that the Court has not previously, nor at this time is the Court overruling any of the other proffered exhibits here, except the Request to Review. And that the Court reserves the right to rule on such exhibits as they are at some future time proffered.

MR. SMITH: All right, sir. I believe that that completes the bill, Judge."

[14] See Footnote 13, *supra.*

cause of "insufficient evidence of violation" cannot be stretched into action by which "the Board has found that petitioners' action in shutting down the plants was not 'concerted' activity protected by §7" as alleged in the Petition at p. 15.

Indeed, the Board made no finding. At most, the Board's general counsel sustained a refusal to issue a complaint against employer, Phillips, because of "insufficient evidence of violation." The area of insufficiency is not even suggested. There is no suggestion that Board found that the activity was not protected by §7 of the federal Act, as petitioners now categorically assert. Petition, p. 16.

Assuming, *arguendo,* that the Board had found that petitioners' activity was not "protected," [i.e. their plant shutdown activity in support of union concerted strike activity], that would have no bearing upon the question whether petitioners' "right to refrain from any or all of such activities," also guaranteed by §7 was infringed by unions. A finding that engaging in particular concerted activity for mutual aid or protection is not "protected" cannot be equated with a finding that union coercion to keep employees from such activity is not violative of the federal Act. Section 7 guarantees both rights "to engage in" and "to refrain from." Determination of the legal status of the former does not determine the legal status of union restraint or coercion to cause employees to forego the latter.

So it is clear that NLRB has never been presented with the opportunity of deciding—nor has it decided—that the union activity here at issue was not protected. The petition herein based principally on the premise that "NLRB necessarily determined that the activity under consideration was neither "protected" nor "prohibited" (Petition, p. 13) and hence "the primary jurisdiction rule has been satisfied making the pre-emption doctrine inapplicable" (Petition, p. 12), thus is shown to be without basis.

In any event, Petitioners' contention is foreclosed by this Court's opinion in *San Diego Bldg. Trades v. Garmon,* 359 U.S. 236, at 244:

> "To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by §7, or prohibited by §8, then the matter is at an end, and the States are ousted of all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. However, the Board may also fail to determine the status of the disputed conduct by declining to assert jurisdiction, or by refusal of the General Counsel to file a charge, or by adopting some other disposition which does not define the nature of the activity with unclouded legal significance. * * * It follows that *the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act.* In

the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. (Emphasis added.)

3.

Even if neither "protected" nor "prohibited," the activity remains preempted.

As demonstrated, the conduct here at issue was either protected or prohibited by the Federal Act. Assuming *arguendo* that it was neither, however, it is still removed from state jurisdiction since it lies squarely within the "area of conduct" as to which the Congress legislated.

Such is the precise holding of *Teamsters Local 20 v. Morton,* 377 U.S. 252, 12 L.Ed. 2d 280, 285, where respondents argued, as do petitioners here, that the union's conduct was neither arguably protected under §7 nor arguably prohibited under §8 of the Federal Act. In reply this Court declared:

> "But even though it may be assumed that at least some of the . . . activity here involved was neither protected nor prohibited, it is still necessary to determine whether by enacting . . . [the federal statute], 'Congress occupied this field and closed it to state regulation'." 12 L. Ed. 2d at 285.

In striking down damages awarded under state law, the Court held:

> "In short, this is an area 'of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law'." 12 L.Ed. 2d at 287.

See also *Plumbers Local 100 v. Borden*, 373 U.S. 690, 698, quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246 ("[o]ur concern is with delimiting *areas of conduct* which must be free from state regulation if national policy is to be left unhampered"). (Emphasis in the original in *Borden*.)

Regulation of strikes and picketing, and preservation of the right to strike without "restricting or expanding either the right to strike or the limitations or qualifications on that right, as these were understood prior to 1947, unless 'specifically provided for' in the Act itself," are central themes of the Federal labor law. *NLRB v. Teamsters Local 639*, 362 U.S. 274, 281. But the right to strike is not exercised in a vacuum. It is exercised by this particular union official or representative giving this particular order, or instruction, or request, or piece of advice, to this particular group of employees, and by that group of employees proceeding to shut down this particular plant in this particular manner. Every step in that sequence must be governed exclusively by the Federal Act, either as protected, prohibited or (as in *Morton*) permitted conduct, or else the whole principle of Federal pre-

emption in this most critical area of strike activity becomes a meaningless abstraction.

As the petitioners themselves acknowledge in another context in a brief to the Supreme Court of Texas: "It is elementary that the 'strike' area is the most sensitive area in management-labor relations. Nowhere is the Supreme Court of the United States more alert to protect NLRB jurisdiction than in a case involving state interference with a strike."[15] We agree.

State intrusion into this area of conduct can wreck the Federal system of collective bargaining. The Texas appellate courts since *Ex parte George,* 371 U.S. 72, and *Borden,* 373 U.S. 690, now understand this, and have properly held that Texas trial courts may not impose million dollar damage judgments against unions for conduct which is within the sweep of the Federal statute.

CONCLUSION

WHEREFORE, the petition for certiorari should be denied.

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[15] Petitioners' "Argument in Support of Motion for Rehearing of Application for Writ of Error," at p. 11.

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March 5, 1965

CERTIFICATE OF SERVICE

This is to certify that on the 5th day of March, 1965, a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was served upon counsel for Petitioners by depositing same in the United States mail with sufficient air mail postage affixed, addressed to:

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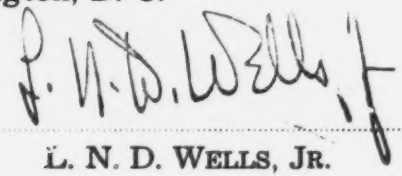

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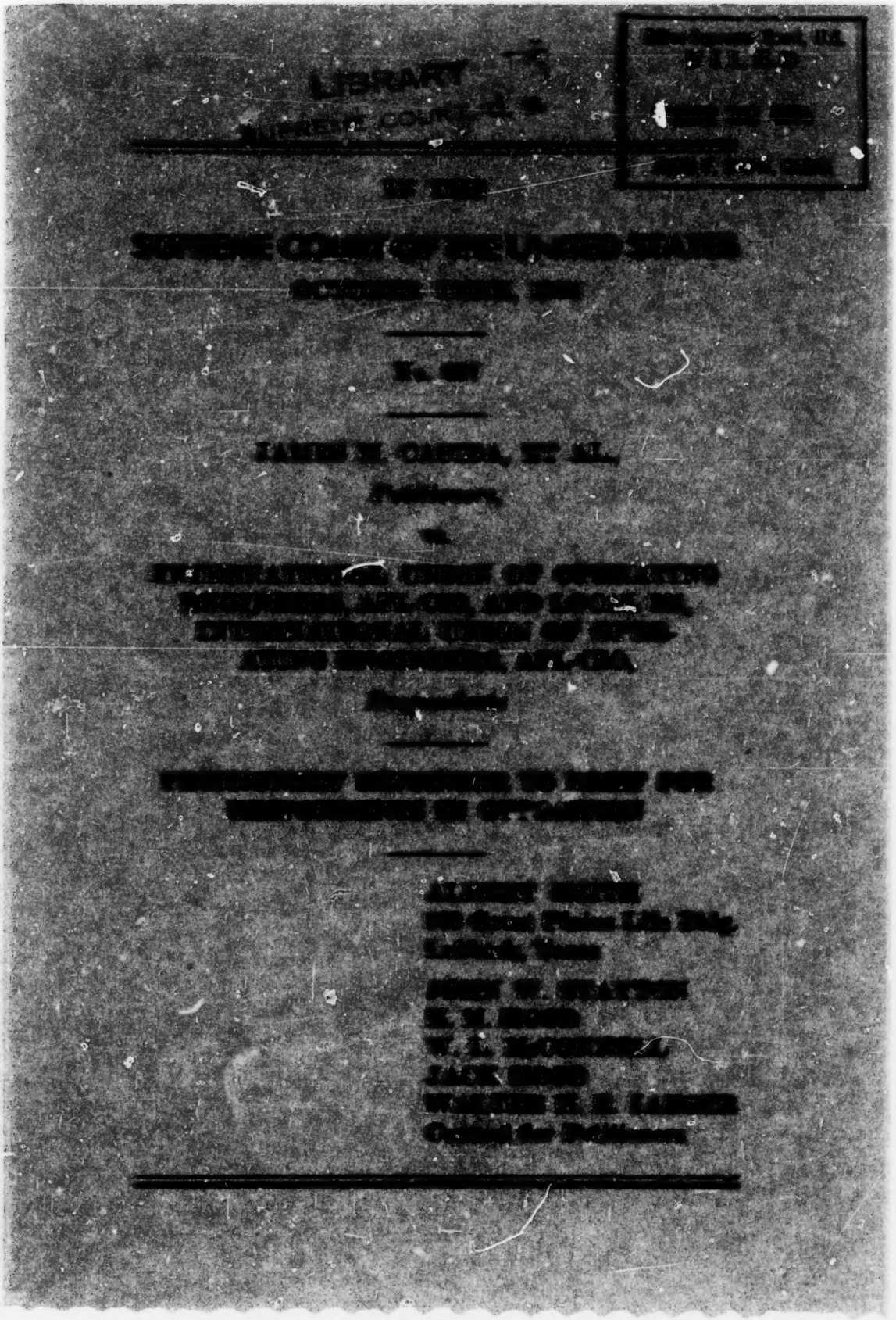

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 897

JAMES M. CASIDA, ET AL.,

Petitioners,

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, AND LOCAL 351, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Respondents

PETITIONERS' REJOINDER TO BRIEF FOR RESPONDENTS IN OPPOSITION

I.

This Cause Should Be Considered Along With No. 527, The Hanna Mining Co. vs. District 2, Etc.

No. 527, *The Hanna Mining Co. vs. District 2, etc.,* is a cause involving the same preemption question as is here involved. In No. 527, this Court has requested the Solicitor General to file a Memorandum for the

United States, and the Solicitor General has done so.

We respectfully suggest that the instant cause should be considered along with No. 527 since both causes involve preemption *and the effect to be given to action of the NLRB in refusing to issue a complaint.*

II.

The Primary Jurisdiction Rule Has Been Satisfied

Respondents argue that for two reasons the primary jurisdiction rule has not been satisfied. First they say the general counsel's refusal to issue a complaint because of "insufficient evidence of violation" is not a determination "that the activity was not protected by § 7 of the federal Act" in that "The area of insufficiency is not even suggested." Second, respondents argue that even if there be a finding that the activity was not "protected" such finding "cannot be equated with a finding that union coercion to keep employees from such activity is not violative of the federal Act." (Brief for Respondents, p. 12.)

Our reply is first that "the area of sufficiency is . . . suggested"; in fact the insufficiency is pinpointed. Admittedly petitioners were discharged by their employer because of petitioners' activity in shutting down the gasoline plants. Admittedly lawyers employed by the respondent unions sought to get petitioners reinstated to their jobs by filing with the NLRB a complaint against the employer. The refusal to issue the complaint can only be explained upon the ground that there was insufficient evidence that petitioners were engaged in "concerted activities" protected by Section 7 when they shut down the plants. If there be any other rational explanation of the general counsel's re-

fusal to issue a complaint, respondents have failed to suggest it.

Moreover a finding that petitioners were not engaged in "concerted activities" protected by Section 7 when they shut down the plants is necessarily a finding that petitioners' "right to refrain from any or all of such activities" was not infringed by respondent unions. If the employer did not violate the act by discharging petitioners in that petitioners were not engaged in "concerted activities" protected by Section 7 when they shut the plants down, the respondent unions did not violate the act by depriving petitioners of the "right to refrain from any and all of such activities" by inducing petitioners to shut the plants down.

Suppose for sake of argument that complaints against both the employer and the respondent unions had been filed with the NLRB. Could the Board have found at one and the same time that the employer did *not* violate the act by discharging petitioners in that petitioners were not engaged in "concerted activities" protected by Section 7, when they shut the plants down, and that the respondent unions *did* violate the act by depriving petitioners of their "right to refrain from any or all of such activities," that is "concerted activities" protected by Section 7?

We respectfully call the Court's attention to the following quotation from the Memorandum for the United States filed by the Solicitor General in No. 527, *The Hanna Mining Co. v. District 2, etc.*:

> "If the General Counsel finds reasonable cause to believe that an unfair labor practice has been committed, he will issue a complaint and the matter will ultimately go before the Board for decision If, on the other hand, he finds no reason to

believe that an unfair labor practice has been committed, he will decline to issue a complaint and the matter will never reach the Board. In the usual case, the General Counsel's refusal to issue a complaint does not 'define the nature of the activity with unclouded legal significance' (*Garmon*, 359 U.S. at 246), and hence does not permit the States to step in.

"The Act, for example, prohibits peaceful picketing when it is conducted for the secondary objectives proscribed by Section 8(b)(4)(B), and limits picketing, even though it is directed only at the primary employer, when it is conducted for recognitional or organizational purposes (Section 8(b)(7)). In general, peaceful picketing otherwise falls either within the specific protection of Section 7 of the Act or within the area which Congress has designedly left to the free play of economic forces. In these circumstances, it is apparent that, should the General Counsel refuse to issue a complaint on charges alleging picketing was being conducted in violation of Section 8(b)(4)(B) or Section 8(b)(7), this would normally not be sufficient to establish that the activity was removed from the preemptive effect of the Act. Such refusal would merely indicate that there was insufficient evidence to bring the picketing within one of the Act's prohibitory bans; *it would not negate the possibility that the picketing was affirmatively protected by Section 7 or designedly left free.*" (Memorandum, pp. 7-8; our emphasis.)

Here the general counsel's refusal to issue a complaint *did* "define the nature of the activities with unclouded legal significance." Here the refusal to issue the complaint can only be explained upon the ground that there was "insufficient evidence" that the petitioners were engaged in "concerted activities" protected by Section 7 when they shut down the gasoline plants; and if there was insufficient evidence that pe-

titioners were engaged in "concerted activities" protected by Section 7, necessarily there was insufficient evidence that respondent unions deprived petitioners of "the right to refrain from any or all of such activities," that is "concerted activities" protected by Section 7 when respondent unions induced petitioners to shut down the gasoline plants.

Section 3(d) of the Labor Management Relations Act, as amended (29 U.S.C., § 153(d)), provides that there "shall be a General Counsel of the Board who . . . shall have final authority, *on behalf of the Board,* in respect of the investigation of charges and issuance of complaints. . . ." (Our emphasis.) Certainly, the determination of the general counsel that there is insufficient evidence of a violation of the Act should be given effect. This is especially so since his decision is final insofar as the Board is concerned and insofar as the courts are concerned. (*Hourihan v. NLRB* (C.A., D.C.), 201 Fed. 2d 187.)

III.

Since the Activity Was Neither "Protected" Nor "Prohibited" It Was Not Preempted

Respondents argue that even though the activity here involved was neither protected nor prohibited by federal law, nevertheless "it is still removed from state jurisdiction since it lies squarely within the 'area of conduct' as to which the Congress legislated." (Brief for Respondents, p. 14.) Respondents cite *Teamsters Local 20 vs. Morton,* 377 U.S. 252, 12 L. Ed. 2d 280, 285, in support of this proposition.

The case cited was one in which the employer obtained a money judgment against the union that rep-

resented its employees for damages resulting from activities during a strike. But here the money judgment against respondent unions was awarded petitioners, one time union members, because of "internal union matters," that is, because of the breach by the respondent unions of their implied contract to advise petitioners of their rights and duties and to refrain from making false representations to petitioners to induce them to engage in activities that resulted in their discharge and in the ruin of their careers.

Moreover, as is plainly shown at pages 20-22 of the Petition, the "internal union matters" here involved do not have "to do directly with matters of employment." Clearly, therefore, the instant case is concerned with matters that Congress has left to regulation by the States.

Respondents argue that "the right to strike is not exercised in a vacuum" and that each "particular order," *etc.*, "must be governed exclusively by the Federal Act." (Brief for Respondents, p. 15.) But this is nothing more nor less than the contention that jurisdiction of "internal union matters" has not been left to the State. A union might without cause expel members immediately prior to a strike because of its belief that such members would elect to refrain from engaging in concerted activities protected by Section 7, and that such course of conduct would weaken the strike. But this would not mean that the State would have no jurisdiction in the premises. Merely because "internal union matters" may have some relationship to a strike, does not deprive the States of their jurisdiction. To employ language quoted from *Borden* (373 U.S. 690), what "national policy" is hampered by allowing the State courts to award damages to the petitioners be-

cause of the breach by the respondent unions of their implied contract with the petitioners in an instance where such breach has nothing whatsoever to do with "concerted activities" either "protected" or "prohibited" by the federal act?

IV.

Implied Covenant

The trial court held that the respondents were under an implied contractual obligation to advise the petitioners of their rights and duties when striking. On the jury finding that the respondents breached that duty, the trial court entered a judgment for petitioners (28 Men's Brief, pp. 178-179 and 146-149). The Court of Civil Appeals and the Supreme Court of Texas ignored the implied contract obligation theory of petitioners' recovery.

This Court held in *Humphrey vs. Moore,* 11 L. Ed. 2d 370 that the State and Federal Courts have jurisdiction to decide questions based upon a contractual obligation even though they may also arguably involve an unfair labor practice:

> ". . . Although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act, it is not necessary for us to resolve that difference here. Even if it is, or arguably may be, an unfair labor practice, the complaint here alleged that Moore's discharge would violate the contract and was therefore within the cognizance of federal and state courts, Smith vs. Evening News Association, supra, subject of course, to the applicable federal law." (11 L. Ed. 2d 378-9.)

There, as here, the union members also alleged fraud, deceit and conspiracy. In the present case, respondents' business agent and vice-president testified that when petitioners joined the respondent union they became entitled to be informed "as to what their rights and duties (were) connected with carrying out a strike." (3 S.F. 137.)

The pleadings, the evidence, and the jury findings support the judgment based on the breach of an implied contractual obligation. (28 Men's Brief, pp. 146-149 and 178-179.)

V.

Petitioners Have Not Gone Outside the Record

Respondents make the captious argument that the documentary evidence reflecting the refusal of the general counsel to issue a complaint to consider the charge that the employer had violated the Act in discharging petitioners because of their action in shutting down the gasoline plants is outside the record. In this respondents are wholly mistaken. The documentary evidence about which there is no dispute is *in* the record. The documents were not admitted in evidence *before the jury* for obvious reasons, but this in no way detracts from the fact that they are part of the record before this Court.

VI.

Petitioners' Argument Is Not "New"

Here, again, respondents seek to cloud the record by leaving the impression that the point of error made by petitioners and supported by argument has not been properly preserved.

As clearly shown in the Petition, pp. 8-9, the facts

are that petitioners have contended, ever since the Texas Court of Civil Appeals held that the state courts have no jurisdiction because of the preemption rule, that such holding is erroneous. All but one of the points of error presented in the Application for Writ of Error to the Supreme Court of Texas presented this contention. The argument that respondents contend is "new" is merely additional argument in support of the proposition, properly presented in the points of error, that the preemption rule is inapplicable and that the state courts do have jurisdiction.

Under Texas practice, all that is required to preserve the right to make any and all argument is to present a point of error to which the argument may be directed. It is not necessary that the point of error refer to the argument that will be made in support of it; in fact, it is better practice to present a purely non-argumentative point of error. But, once the point of error is properly presented and preserved, any and all argument in support of it can be presented in any court.

In connection with the foregoing we call attention to the fact that Rule 469 of the Texas Rules of Civil Procedure provides that "The points of error relied on, separately numbered, shall be stated in short form *and without argument* . . ." The Supreme Court of Texas has held that "So much of an assignment as is argumentative is unnecessary, and, as we think, improper." (*Hodo v. Mexican National Ry. Co.*, 88 Tex. 523, 524, 32 S.W. 511.)

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Proof of Service

I, Albert Smith, one of the attorneys for James M. Casida, et al., petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 19th day of March, 1965, I served copies of the foregoing Rejoinder to the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas on the several parties thereto as follows:

(1) On International Union of Operating Engineers, AFL-CIO, a respondent herein, by mailing a copy in a duly addressed envelope with postage prepaid to Mullinax, Wells, Morris & Mauzy, 1601 National Bankers Life Building, Dallas 1, Texas, and to Woll, Mayer & St. Antoine, 736 Bowen Building, Washington 5, D.C.

(2) On Local 351, International Union of Operating Engineers, AFL-CIO, the other respondent herein, by mailing a copy in a duly addressed envelope with postage prepaid to Arthur Mitchell, 400 First Federal Savings Building, 11th and San Jacinto Streets, Austin, Texas, and to Sam Houston Clinton, Jr., 205 May Building, 308 West 11th Street, Austin, Texas.

Albert Smith
909 Great Plains Building
Lubbock, Texas

Attorney for James M. Casida, et al.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No 897

JAMES M. CASIDA, ET AL.,

Petitioners

vs.

INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, AND LOCAL 351, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Respondents

MOTION FOR REHEARING

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Counsel for Petitioners

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Respondents

MOTION FOR REHEARING

TO THE SUPREME COURT OF THE UNITED STATES:

Since the filing of petitioners last Brief in this Court three things have occurred which make a reconsideration of the Petition for a Writ of Certiorari proper and imperative:

1. Petitioners have filed a Petition with the National Labor Relations Board in Washington, D. C. requesting that the Judgment of the trial Court be enforced, and that a ruling be made on the question of pre-emption.

2. This Court granted a Writ of Certiorari in Hanna Mining Company vs. Marine Engineers Beneficial Association Number 527 involving similar questions of pre-emption and the effect of a refusal of the NLRB to issue a complaint against the Union.

3. The Court must have overlooked the breach of a contractual obligation by the respondent Unions.

(1) In an effort to guess at what this Court had in mind in refusing their Petition for a Writ of Certiorari, the Petitioners have filed a Petition with National Labor Relations Board in Washington requesting that the Judgment of the Trial Court be treated as a claim against the respondent Unions, and that the Board furnish relief. We respectfully urge that this Court should know what disposition is going to be made of the Petitioners' wrongs by the National Labor Relations Board before it turns the petitioners away without a remedy.

(2) This Court granted a Petition for a Writ in Hanna Mining Company No. 527 which involved only a few thousand dollars worth of property rights. The 28 petitioners now before this Court have had their careers destroyed; have lost their pensions and fringe benefits; and have been reduced to working at jobs paying them less than half the amount of money they made before the respondent Unions breached their contractual obligation, and made the fraudulent representations which caused petitioners to lose their jobs and their hope for the future. Turn them out, and a rank miscarriage of justice will be stamped "APPROVED."

(5) The Trial Court held that the respondents were under an implied contract obligation to the petitioners; that the respondents breached that implied contract obligation; and that the petitioners received damages aggregating $1,186,000.00 as a result . It is true! The business agent testified that each member pays monthly dues of $3.00; that $1.90 of that sum goes to the local; and the remaining $1.10 per month goes to the international (SF Volume 7 page 224). In return, the Union became obligated by virtue of the contract between it and its members to exercise at last reasonable care to inform them on how to conduct themselves in carrying out a strike. The respondents business agent testified:

> "Q. So, I take it, then, that one of the things that the member gets when he joins up with the International Union of Operating Engineers is the right to advice and counsel from the International?
>
> "A. He is entitled to that, sir; yes, sir.
>
> "Q. Well, at any rate, when these men joined the International Union of Operating Engineers, they became entitled to the assistance and to the counsel and advice of that Union, didn't they?
>
> "A. Yes, sir." (S. F. Vol. 7, p. 224).

Mr. Looney, the vice-president of Local 351, testified by deposition;

> "Q. Was it the duty of the Union to keep its members well informed and advised as to what their rights and duties (were) connected with the carrying out of the strike?
>
> "A. Yes, sir." (S.F. Vol. 3 p. 137).

This Court has stated that when contract obligations between members and their Union are violated, the violation of that contractual right is "within the cognizance of Federal and State Courts." You said so in Humphrey vs. Moore 11 Lawyers Edition 2d 370:

> ". . . Although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act, it is not necessary for us to resolve that difference here. Even if it is, or arguably may be, an unfair labor practice, the complaint here alleged that Moore's discharge would violate the contract and was therefore within the cognizance of federal and state courts, Smith vs. Evening News Association, supra, subject of course, to the applicable federal law." (11 L. Ed. 2d 378-9.)"

We understand full well, and have always been extremely fearful of the fact, that this Court does not regard itself as "a court of general errors and appeals": Justice John M. Harlan 34 Okla. Bar Journal 1469-1450. Nevertheless, where the State Court has expressly stated that it was controlled by a decision of the Supreme Court of the United States, we submit that this Court has a duty to correct the misapprehension of the State Court. Certainly, it should be done in a case where the economic future of twenty-eight men and their families have been destroyed by the willful and fraudulent representations of the Union leadership, and particularly, when that misconduct involves a breach of contract between the Union member and his Union.

Does the Court know that the petitioners went to

the NLRB shortly after they had been discharged by the Phillips Petroleum Company seeking an order for their reinstatement and back pay: 33 Individual Complainants vs. Phillips Petroleum Company, Cases No. 16-CA-1116 through 1146 and 1149-1150.? On March 13, 1959 the General Counsel for the NLRB issued a letter holding that "The General Counsel sustains the ruling of the Regional Director. Like the Director, the General Counsel concludes that there is insufficient evidence of violations to warrant further proceedings." In their briefs before the NLRB, the unions accepted equal responsibility with Phillips Petroleum Company and absolved the Petitioners of any wrong-doing. Since the General Counsel had, in effect, held that the conduct involved was not "concerted activity" and was not "protected" by the LMRA, Petitioners filed the present suit in the State Court against the respondent unions for breach of implied contract obligation, and for damages resulting from the fraudulent representations of the respondents' agents and alteregos. Obviously, th NLRB was wrong in refusing to issue a complaint or the State Court is wrong in holding that the activities were pre-empted because of the "concerted activity" or "protected" provisions of the LMRA. It necessarily follows, that this Court is wrong in refusing the Writ because it leaves the petitioners without a remedy in a case that the Board has held is not pre-empted. Surely the Supreme Court should look into the matter.

If it is to be the law of the land that a Union can breach its implied contract with a member, and by fraud-

ulent representations mislead a member into committing a breach of the peace against the peace and dignity of his State, and cause him to lose his job and fringe benefits as a result, then the Supreme Court of the United States should say so. The matter should not be left in the state of confusion in which the decision of the State Court leaves it in this case: With the Supreme Court of the United States saying in Humphrey vs. Moore, 11 Lawyers Edition 2d 370, that the breach of contractual obligations between a Union and its members is "within the cognizance of Federal and State Courts"; with most State Courts taking the position that they will assume jurisdiction in a case of this kind until the Supreme Court of the United States announces the contrary: Lockridge v. Amalgamated Association of St. Elec. Ry., etc., Employees, 369 Pac. 2d 1006, 1010; with the Supreme Court of Texas taking the position that once they have been "knocked down" by the Supreme Court of the United States, they will hold everything pre-empted; and with the State Court holding that a "hiring hall" case, Plumbers' Union v. Borden, 373 U.S. 690, controls this breach of contract and fraudulent representation case.

This case will have greater impact upon the field of labor law than any case decided by this Court in the last twenty years. It should be used to establish an area of responsibility between a Union and its mmbers. The matter should not be summarily dismissed on a Petition for Writ of Certiorari.

WHEREFORE, Petitioners pray that the Court set aside the Order refusing a Petition for a Writ of Certi-

orari; grant the Petitioners a Writ of Certiorari; and in any event that the Court refrain from passing upon this Motion for Rehearing until the National Labor Relations Board acts upon the Petitioners' Petition with the Board, and a determination is made of what is to be done about the wrongs inflicted upon the petitioners by the respondents after this matter leaves this Court.

Respectfully Submitted,

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CERTIFICATE

I, Albert Smith, one of the attorneys of record for the petitioners, and a member of the bar of the Supreme Court of the United States, do hereby certify that this Motion for Rehearing is presented in good faith and not for delay. The Motion is restricted to the grounds above specified.

I further certify that I have mailed a copy of this Motion for Rehearing to Mullinax, Wells, Morris & Mauzy, Arthur Mitchell, Sam Houston Clinton, Jr., and Woll, Mayer and St. Antoine, at their respective post office addresses in properly stamped and sealed envelopes and that the foregoing attorneys represent all of the respondents in this cause.

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